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# In the Supreme Court of the United States

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO.,

*Petitioner*,

v.

CURTIS CAMPBELL AND INEZ CAMPBELL,

*Respondents*.

**On Writ of Certiorari to the Utah Supreme Court**

## BRIEF OF THE AMERICAN TORT REFORM ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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## BRIEF OF THE AMERICAN TORT REFORM ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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## INTEREST OF THE *AMICUS CURIAE*[1]

Founded in 1986, the American Tort Reform Association ("ATRA") is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than a decade, ATRA has filed *amicus curiae* briefs in cases before this Court that have addressed important liability issues, including the limits imposed by the Constitution on punitive damages awards. ATRA's members have a substantial interest in the development of sound legal principles governing the power of juries to mete out punishment in civil litigation.

## INTRODUCTION AND SUMMARY OF ARGUMENT

In *BMW of North America, Inc.* v. *Gore,* 517 U.S. 559, 574 (1996), this Court explained that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." In concluding that the $2 million award of punitive damages in that case was "grossly excessive," the Court identified three "guideposts" – "the degree of reprehensibility" of BMW's conduct; the ratio of the amount of punitive damages imposed to the "harm or potential harm suffered by Dr. Gore"; and the difference between the $2 million exaction and "the civil remedies authorized or imposed

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[1] Letters of consent by the parties to the submission of amicus briefs have been filed with the Clerk of the Court. Pursuant to Rule 37.6, ATRA states that no counsel for a party has authored this brief in whole or in part and that no person or entity, other than *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

in comparable cases" – "each of which indicate[d] that BMW did not receive adequate notice of the magnitude of the sanction that Alabama might impose." *Id.* at 574-75. Properly understood, those same guideposts demonstrate that State Farm did not receive fair notice that it could be subjected in the Utah courts to a whopping punishment of $145 million in a case involving a policyholder's claim that the company engaged in bad faith in refusing to settle for policy limits ($50,000) a third-party claim that resulted in a $186,000 judgment against State Farm's insured.

There is more at stake in this case, however, than the admittedly valuable opportunity to rectify a notorious example of punitive damages "run wild." *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 18 (1991). At bottom, this case is about whether the *BMW* factors are to be interpreted in a manner that ensures that they will function as intended: as meaningful guidance for appellate review of punitive damages and as a safeguard to ensure that defendants who are punished through the imposition of exemplary damages receive the fair notice required by the Due Process Clause.

The Utah Supreme Court erred by focusing on the so-called "PP & R policy," allegedly a "national scheme to meet corporate fiscal goals by capping payouts on claims," rather than on State Farm's conduct vis-à-vis Mr. Campbell, in assessing the "reprehensibility" guidepost. Even to the limited extent it did focus on the right conduct, the court lost sight of the grounding of the *BMW* guideposts in concepts of fair notice, deeming especially reprehensible conduct that was not even clearly tortious at the time State Farm decided to take Mr. Campbell's automobile accident case to trial. This Court's constitutional decisions concerning punitive damages consistently focus on the conduct of the defendant toward the plaintiff. Similar conduct toward others may be taken into account as an aggravating factor, but may not itself be punished. A defendant cannot be said to have fair notice that it will be punished in one plaintiff's non-class lawsuit for actions directed at other persons or that *dissimilar* acts will be used to increase the size of punishment. No



reasonable company would expect the size of its punishment for its handling of one third-party claim in Utah to depend on such things as how it conducted an investigation of a suspected conflict of interest of an employee in California or whether it specified "non-OEM" parts (see pp. 15, 17-18, *infra*) in handling first-party claims around the country.

It is no answer to say that all of the disparate conduct was part of a national "scheme" to increase profits. Remedies *designed* to deal with widespread "schemes," including class actions and the use of "pattern" statutes such as RICO, are problematic enough and have led to enough litigation abuses without adding the new, ad hoc "remedy" of awarding enormous punitive damages to an individual plaintiff far from the heart of any such "scheme." And the court's argument is available, at least in theory, in virtually any case against a business defendant. Virtually all conduct of a business entity has the purpose of making profits, and some portion of that conduct will likely be of a sort that a plaintiff's attorney can call into question, especially if given as much leeway as plaintiffs' counsel were given in this case. It is not hard to call all questioned conduct a "scheme" to make profits. And there is a real danger that defendants will be punished *not* for *mis*conduct, but for socially beneficial and lawful conduct just because the jury is sympathetic to the views of one side of a policy debate about such practices. The Court should not allow punitive damages to be based on "schemes" defined at such high levels of generality, but rather should heed the teachings of another line of cases based in concepts of "fair warning," the qualified-immunity cases, which require that sanctionable conduct have been defined with specificity *before* the defendant undertook it.

Because adequate notice of the *magnitude* of the sanction, and not just fair notice of punishability, is required, this Court in *BMW* included as its second "guidepost" the ratio of punitive to compensatory damages. The Utah Supreme Court misapplied that factor too. First, it again failed to focus on the defendant's conduct toward the specific plaintiff before the Court. Second, it departed radically from prior law that might have given State

Farm notice of the magnitude of potential punishment. At the time of the relevant tort, no punitive award greater than $500,000 had ever been upheld in Utah. Before the state supreme court's decision, that number had grown only to $4 million, and Utah courts explicitly treated ratios greater than 3:1 as suspect. There was no constitutionally adequate notice that a $145 million punishment and 145:1 ratio were possible in this case.

The third *BMW* guidepost, "the civil remedies authorized or imposed in comparable cases," 517 U.S. at 574, is particularly important in assuring defendants notice of the magnitude of possible punishment and was particularly robbed of meaning by the decision below. Once again, the court below failed to focus on penalties for what was done *to Mr. Campbell*. Likewise, the Court engaged in an exercise in the absurdly hypothetical, rather than focusing on *realistic* possibilities, as it should have under *BMW* and *Cooper Industries, Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 442-443 (2001).

Finally, the Utah Supreme Court confused the state-law inquiry into the excessiveness of punitive damages – which has historically included the defendant's "wealth" as a key factor – and the *independent* federal check on unconstitutional excessiveness, which has never treated "wealth" as a relevant "guidepost." The Court should reaffirm that "wealth" is *not* a *BMW* guidepost and correct the Utah Supreme Court's error in treating corporate "wealth" as a major factor in its federal constitutional analysis.

## ARGUMENT

The Due Process Clause of the Fourteenth Amendment embodies the "basic principle that a criminal statute must give fair warning of the conduct that it makes a crime." *Bouie* v. *City of Columbia*, 378 U.S. 347, 350-51 (1964). Where this "constitutional requirement of definiteness" is missing, so that a criminal proscription is not "sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties," this Court has not hesitated to



invalidate such laws as void for vagueness. *Id.* at 351 (internal quotations omitted). The Court has also applied this principle to cases where "a similarly unforeseeable state-court construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct," on the theory that there, too, "the effect is to deprive [the individual] of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime." *Id.* at 354-355. The bedrock due process requirement of fair warning protects the rights of individuals against arbitrary and unforeseeable actions by state actors (including lay juries); it also disciplines and checks government power by requiring precision in the definition of crimes before the government may bring to bear the full weight of its prosecutorial authority.

In *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559 (1996), the Court noted that, although "[t]he strict constitutional safeguards afforded to criminal defendants are not applicable to civil cases," the "basic protection against 'judgments without notice' afforded by the Due Process Clause * * * is implicated by civil *penalties*." *Id.* at 574 n.22 (emphasis in original). Moreover, "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *Id.* at 574. Applying these fundamental guarantees concerning fair notice, the Court invalidated a $2 million punishment imposed on BMW by an Alabama jury as grossly excessive. The Court's analysis focused on three critical "guideposts, *each* of which indicate[d] that BMW did not receive *adequate notice of the magnitude* of the sanction that Alabama might impose." *Ibid.* (emphasis added).

In upholding the astronomical $145 million punitive exaction in this case, the Utah Supreme Court misapprehended – and misapplied – all three of the *BMW* guideposts that inform the constitutional inquiry into fair notice. The Utah Supreme Court failed to use the proper baseline for evaluating the degree of reprehensibility of State Farm's conduct: the specific actions

that formed the basis for the bad-faith claim at issue in this lawsuit. Rather than focus on *that* conduct, the Utah Supreme Court considered a wide array of unrelated conduct, much of it occurring in other States, that has nothing to do with the company's decisions to settle or litigate third-party claims against its insureds in Utah during the relevant time period – *i.e.*, the period in which the events underlying respondents' claims occurred (1981-86). The lower court also misunderstood and misapplied the second and third *BMW* factors.

### A. The Reprehensibility Factor Properly Focuses On The Nature Of The Defendant's Specific Conduct Toward The Plaintiff Before The Court

Underlying this Court's use of the reprehensibility "guidepost" in *BMW* is a common-sense idea: the greater the degree of wrongfulness of the defendant's conduct, the more likely the defendant is to have fair notice that he will be subject to a substantial punishment for engaging in it. In *BMW*, *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443 (1993), and *Cooper Industries, Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 435 (2001), the Court made clear that the principal focus of the inquiry into reprehensibility is the defendant's conduct toward the plaintiff. Because society's view of the moral culpability of conduct obviously changes over time, it also stands to reason that the defendant's fair notice with respect to its culpability must be assessed at the time the underlying conduct occurs.

The Utah Supreme Court ignored these principles, and disregarded the teachings of both *BMW* and *Cooper*, in concluding that the "reprehensibility factor [wa]s met" and thus supported the jury's whopping punishment of $145 million. Pet. App. 29a (incorporating opinion's prior discussion of reprehensibility considerations under Utah law); see also *id.* at 17a-22a (discussing Utah factors). To begin with, the Utah Supreme Court's analysis of State Farm's conduct focused almost exclusively on the so-called "'Performance, Planning and Review,' or PP & R, policy," which the court described as a



"national scheme to meet corporate fiscal goals by capping payouts on claims company wide." Pet. App. 6a; see also *id.* at 18a-19a (giving several examples of allegedly reprehensible conduct, including State Farm's "cheat[ing] it customers via the PP & R scheme * * * [f]or over two decades," its "deliberate concealment and destruction of documents related to this profit scheme," and its use of "mad dog defense tactics").

Only secondarily did the Utah Supreme Court take note of or focus on State Farm's conduct *in relation to Mr. Campbell* that formed the basis for the latter's claim against the company for bad-faith refusal to settle the third-party claim against him for the policy limits. Thus, the Utah Supreme Court noted almost in passing that there was evidence that a former State Farm adjuster (who was fired by the company) had been told to alter the Campbell file to change his evaluation of liability and include a statement that Todd Ospital was speeding on his way to see his pregnant girlfriend at the time of the accident. Pet. App. 18a. It also relied on the asserted fact that, for a period of about eighteen months after the return of the excess verdict in September 1983, the Campbells "lived * * * under constant threat of losing everything they had worked for" by having the judgment executed against them. *Id.* at 22a. That prospect, the court said, "led to sleeplessness, heartache, and stress in the Campbell's marriage and family relationships." *Ibid.* Here again, however, the Utah Supreme Court agreed with the trial court's assessment that, although "'[t]he harm is minor to the individual,'" it was "'massive in the aggregate'" (*id.* at 22a) – again, relying on the adverse effects of the supposed "scheme" relating to implementation of the PP & R policy.

Even to the limited extent it *did* focus on State Farm's conduct vis-à-vis Mr. Campbell, the Utah Supreme Court lost sight entirely of the grounding of the *BMW* guideposts in concepts of fair notice. At the time it decided to take Mr. Campbell's automobile accident case to trial, State Farm could reasonably have anticipated that it would not be held liable in tort *at all* if it ultimately paid any judgment against Mr. Campbell in excess of policy limits. At the time that State Farm had the opportunity

to settle for policy limits but failed to do so (August and September of 1983), Utah law did not clearly recognize an action for bad-faith failure to settle if the insurer ultimately paid the excess verdict in full. Indeed, as the Utah Court of Appeals recognized, as late as 1992 this issue was "one of first impression in Utah." *Campbell* v. *State Farm Mut. Automobile Ins. Co.*, 840 P.2d 130, 137 (Utah App. 1992). And rulings by several courts elsewhere in the country suggested that there could be no bad-faith action if the insurer either succeeded in getting the underlying verdict reversed or – as here – ultimately paid the excess judgment in full. See *Kricar, Inc.* v. *General Accident, Fire & Life Assurance Corp.*, 542 F.2d 1135, 1136 (9th Cir. 1976) (per curiam) (insurer's satisfaction of entire judgment, including excess portion, "negatives any finding of bad faith"); *Kelly* v. *Williams*, 411 So. 2d 902 (Fla. App. 1982); *Nationwide Ins. Co.* v. *Superior Court*, 180 Cal. Rptr. 464 (Cal. App. 1982); *American Home Ins. Co.* v. *Seay*, 355 So. 2d 822 (Fla. App. 1978). That case law from other jurisdictions was sufficiently persuasive to cause the state trial judge to grant summary judgment in State Farm's favor in this case, which the Utah Court of Appeals reversed in 1992. *Campbell* v. *State Farm Mut. Automobile Ins. Co.*, *supra*, 840 P.2d 130. Not just State Farm, but a member of Utah's own judiciary, thought State Farm had done nothing tortious at all to Mr. Campbell, let alone anything particularly reprehensible.

The temporary but real fears of someone threatened with having to pay an excess verdict may be a good reason to recognize a bad-faith tort despite an insurance company's eventual payment in full.[2] And the alleged shenanigans with respect to

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[2] But see Bauman, *Emotional Distress Damages and the Tort of Insurance Bad Faith*, 46 DRAKE L. REV. 717, 746-747 (1998) (footnotes omitted and emphasis added):

> The imposition on the insurer of a duty to give the interests of the insured at least as much consideration as its own and to treat offers of settlement as if the policy had no limits has resulted in *an almost ritualized treatment of excess judgment cases*. Knowledgeable plaintiff attorneys understand the need to *"set up" the liability insurer by making a policy limits demand* * * *. Once the policy limits offer is made and refused, the insurer and insured have potentially conflicting interests, *which are worked out in well-programmed steps*. If an excess judgment is in fact entered and upheld against the insured, the insured has a potentially valuable claim against the insurer for violation of the duty to settle. *This claim is often assigned to the victorious plaintiff in exchange for a covenant not to execute on the judgment.* The plaintiff in the underlying action then pursues the bad-faith claim against the insurer, trying to collect the amount of the excess.
>
> The ability to assign the third-party bad-faith claim to the holder of the excess judgment in exchange for a release from the threat of excess liability cuts against the notion that the insured is necessarily being made to suffer great emotional torment.

See also Syverud, *The Duty to Settle*, 76 VA. L. REV. 1113, 1169 (1990) ("plaintiffs already attempt to 'set up' insurers for excess liability claims").



falsification of the Ospital file may (if believed) be a good reason to find bad faith in this case. But those are not factors justifying a determination that State Farm was on notice that its conduct vis-à-vis Mr. Campbell could be thought *particularly* reprehensible even within the range of actions deemed to be tortious because of bad faith. Cf. *BMW*, 517 U.S. at 577-578 (noting difference between Alabama Supreme Court's undoubted authority to condemn BMW's conduct and federal constitutional determination that it was not particularly reprehensible).

The Utah Supreme Court's failure to focus on State Farm's specific handling of the third-party claims against Mr. Campbell in evaluating the culpability of the company's conduct ignores this Court's teachings in *BMW*, *TXO*, and *Cooper*. In *BMW*, this Court focused on BMW's nondisclosure of the "presale refinishing of [Dr. Gore's] car" in evaluating the reprehensibility factor. 517 U.S. at 575; see also *ibid.* (explaining that refinishing itself "had no effect on [the car's] performance or safety fea-

tures, or even its appearance for at least nine months after [Dr. Gore's] purchase"). Similarly, in *TXO*, the Court focused principally on the defendant's conduct in slandering the victim's title. See 509 U.S. at 462 (noting that evidence showed that TXO "set out on a malicious and fraudulent course to win back, either in whole or in part, the lucrative stream of royalties that it has ceded to Alliance"); see also *id.* at 468 (Kennedy, J., concurring in part and concurring in the judgment) (emphasizing that record contained evidence that TXO acted toward plaintiff "with actual malice" and that underlying claim in lawsuit was for an intentional tort). In *Cooper*, the Court's discussion of the wrongfulness of the underlying conduct focused on the defendant's conduct underlying the plaintiffs' unfair competition claim. 532 U.S. at 442-443.

That the principal focus of the *first* and indeed all *BMW* guideposts is the defendant's conduct *toward the specific plaintiff before the Court* is also reflected in the analysis of the *second BMW* factor: the ratio of exemplary damages to compensatory damages. In discussing this factor in *BMW*, the Court noted that "perhaps [the] most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to *the actual harm inflicted on the plaintiff*." 517 U.S. at 580 (emphasis added); see also *ibid.* ("[t]he principle that exemplary damages must bear a 'reasonable relationship' to compensatory damages has a long pedigree"). By their very nature, of course, compensatory damages are tied to the proven harm suffered by a particular plaintiff based on the claims asserted in a particular case. In *TXO*, the Court made clear that it is also appropriate for courts "to consider the magnitude of the *potential harm* that the defendant's conduct would have caused *to its intended victim* if the wrongful plan had succeeded." 509 U.S. at 460 (first emphasis in original, second added); see also *BMW*, 517 U.S. at 581 (emphasis added) (summarizing *TXO* as having "relied on * * * the harm *to the victim* that would have ensued if the tortious plan had succeeded"). And, in *Cooper*, this Court reiterated that the relevant determination for ratio purposes is "the relationship between the penalty and *the harm*



*to the victim* caused by the defendant's actions." 532 U.S. at 435 (emphasis added); see also *id.* at 440 (courts must consider, among other things, "the disparity between *the harm (or potential harm) suffered by the plaintiff* and the punitive damages award") (emphasis added). Limiting analysis of the second factor in this way – or, indeed, treating the ratio as important at all – would make little sense if the first (reprehensibility) factor were not meant to focus on conduct toward the plaintiff.

To be sure, the Court in both *BMW* and *TXO* did indicate that the inquiry into reprehensibility may also take into account "the existence of *similar* past conduct" on the defendant's part. *TXO*, 509 U.S. at 462 n.28 (emphasis added). That is because "repeated misconduct is more reprehensible than an individual instance of malfeasance." *BMW*, 517 U.S. at 580. Applying that principle, the Court in *BMW* considered other examples of the defendant's failure to disclose pre-sale refinishing work to customers who had purchased vehicles in Alabama. *Id.* at 563-564. Likewise, the Court in *TXO* took account of "similar nefarious activities" of the defendant "in its business dealings." 509 U.S. at 451; see also *id.* at 460 (in analyzing ratio factor, considering "the possible harm to other victims that might have resulted if *similar* future behavior were not deterred") (emphasis added). But, in considering identical or similar examples of misconduct on the defendant's part, the Court's principal focus necessarily remained on the conduct underlying the plaintiff's claims. Just as judges in sentencing criminal defendants may take account of recidivism as an aggravating *factor*, so too may *the conduct toward the plaintiff* be seen as more reprehensible if the defendant does the same or almost the same thing over and over to many similarly situated people. But that does not mean that the conduct toward other people may itself be punished *in the plaintiff's lawsuit*. See *Gryger* v. *Burke*, 334 U.S. 728, 732 (1948) ("The sentence as a fourth offender or habitual criminal is not to be viewed as * * * additional penalty for the earlier crimes. It is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one."), *cited in*

*BMW*, 517 U.S. at 577. If this Court does nothing else in this case, it should correct the Utah Supreme Court's confusion between stiffening the penalty for what State Farm did to Mr. Campbell and punishing State Farm for what it did to other people. The former might be legitimate – within reason – *if* justified by a showing of repeated *similar* misconduct and fair notice that such conduct was punishable. The latter (which is what occurred in this case) would never be legitimate.

This approach is dictated by the fundamental requirement of fair notice imposed by the Due Process Clause. A defendant may reasonably anticipate that, if the conduct underlying a plaintiff's legal claim is punishable under state law and reprehensible (on its own or as part of a pattern of recidivism), it could draw a punishment proportionate to the degree of culpability. But a defendant cannot be said to have fair notice that it will be punished in one plaintiff's non-class lawsuit for actions directed at other persons or that *dissimilar* acts of alleged misconduct will be used to increase the size of the punishment in a particular case. Nor do such dissimilar actions inform whether the specific conduct underlying the plaintiff's claims against a defendant was reprehensible at the time it occurred. As Professor Amsterdam observed in one of the most famous elucidations of the due process concept that litigants must be given fair notice of that for which they will be punished, "[i]t is scarcely consistent with ordered liberty that the amenability of an individual to punishment should be judged solely upon the sum total of badness or detriment to the legitimate interests of the state which can be found, or inferred, from a backward looking appraisal of his trial record." Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 81 (1960).

The Utah Supreme Court plainly deviated from these principles. It considered a welter of conduct completely unrelated to State Farm's handling of third-party claims against its insureds in Utah during the relevant time period (1981-86). Among other things, the lower courts relied on certain activities of State Farm Fire and Casualty Insurance Company, a separate



company that primarily offers homeowners' insurance, including that company's prospective cancellation of hurricane insurance coverage in Florida, and handling of earthquake damage claims and other property damage claims in California. Putting aside the fact that such conduct was undertaken by a *different corporation* in *other States* during time periods *remote from the time frame relevant to this case* (1981-86), what is striking about the use of this conduct is how little resemblance it bears to the conduct underlying the respondents' claims in this case. Such first-party claims present a vastly different situation to an insurer than do the third-party claims at issue in this case.

The difference between first-party and third-party claims may sound like a dry and technical insurance concept, but it is not. The insured and the insurer in a first-party case are like the plaintiff and the defendant in a contract lawsuit, whereas the insured and the insurer in the third-party claim context are like two co-defendants in someone else's tort lawsuit.

First-party claims are any of the extremely wide variety of demands an insured may make on his or her (or its) own insurance company under the contract of insurance. The relationship may be less adversarial than an actual lawsuit, but fundamentally the insured wants the insurer to give him something under the contract and the insurer must decide how much to give the insured.

Third-party claims, by contrast, necessarily involve a claim that the insured is for some reason liable to another party who does *not* stand in a relevant contractual relationship with the insurance company. The insurance company and the insured have an adversarial relationship, but *not* with each other. Rather, they have a *common* interest in defending against the third party's claim. Differences certainly may arise, as they may in any situation of common interest, about how best to pursue that end, and any excess verdict creates potential tension between the insured and the insurer about who is responsible for the

excess,[3] but the *basic* economic incentive of insured and insurer, like the basic incentive of co-defendants in a lawsuit, is to present a common front against the third-party adversary, not to be adversarial toward each other. Thus, when conflicts between insured and insurer arise in third-party cases, they do so for reasons very different from the reasons why conflicts arise in first-party cases. See also *Canyon Country Store* v. *Bracey*, 781 P.2d 414, 423 (Utah 1989) ("[P]unitive damages are not available. Allegations of a breach of the implied covenant of good faith and fair dealing owed first party insurers and their insured sound in contract, not in tort."); *Beck* v. *Farmers Ins. Exch.*, 701 P.2d 795, 800 (Utah 1985) ("[I]t is difficult to find a theoretically sound basis for analogizing the duty owed in a third-party context to that owed in a first-party context. * * * [T]here is no sound theoretical difference between a first-party insurance contract and any other contract, at least no difference that justifies permitting punitive damages for the breach of one and not the other.").[4]

Other conduct relied on by the lower courts in upholding the massive punitive exaction was equally far removed from State Farm's handling of the third-party claims against Mr. Campbell. For example, the Utah Supreme Court cited evidence that (1) "State Farm's fraudulent practices were consistently directed to * * * poor racial or ethnic minorities, women, and elderly

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[3] *Amicus* understands, however, that State Farm as a matter of policy decided during the trial of this case that henceforth it would reassure its insureds in advance that any excess verdict would be covered by the company and not by the insured, just as was in fact eventually done in Mr. Campbell's case.

[4] It is ironic that the Utah Supreme Court relied on alleged misconduct in handling first-party claims to justify giving punitive damages to the Campbells when *no* punitive damages would be available under Utah law in the first-party cases themselves. What is more fundamental, however, is that the conduct underlying the first-party claims is dissimilar to the conduct undertaken vis-à-vis Mr. Campbell.



individuals" (Pet. App. 18a-19a) even though Mr. Campbell made no claim of discrimination against him based on any of those categories; and (2) State Farm engaged in "mad dog defense tactics" (*id.* at 19a), even though there was no claim that the lawyer chosen by State Farm to defend the case against Mr. Campbell engaged in any abuse of the litigation process, and it is unclear how any such abuse would have harmed rather than helped Mr. Campbell. The Utah Supreme Court also cited (*ibid.*) State Farm's investigation in California into the personal life of an employee (Ina DeLong) suspected of having a conflict of interest because of a gift received from a contractor. And the lower courts relied on State Farm's specification of non-original equipment manufacturer ("OEM") parts in determining how much to pay for repairs to insured vehicles in other States – another first-party context far removed from the events underlying the handling of respondents' third-party claims in this case.

The lower courts' reliance on such vastly dissimilar conduct occurring in other States years or decades after the fact deprived State Farm of the minimum fair notice required by the Due Process Clause. No reasonable company would expect that the size of its punishment for its handling of the third-party claims brought in the Utah courts against Mr. Campbell in the early 1980s (and refusal to settle for the policy limits) would depend on how the company conducted an investigation into a suspected conflict of interest of an employee in California. Nor would a company reasonably expect to be punished based on the conduct of separate corporate affiliates in other States relating to handling of first-party claims. Indeed, it would take the imagination of Oliver Stone to come up with a conspiracy theory under which State Farm's use of non-OEM parts to determine repair cost had anything to do with insisting on taking Curtis Campbell's liability case to trial. By relying on such completely unrelated conduct in upholding the $145 million punishment, the Utah Supreme Court deprived petitioner of fair notice.

It is no answer to say – as respondents did in the lower courts – that all of the disparate conduct cited by the lower courts was part of a national "scheme" to increase State Farm's profitability through fraudulent and unfair practices. There are several problems with that argument, apart from its failure to adhere to the limits recognized in *BMW*, *TXO*, and *Cooper*. *First*, this case is not a class action but rather an individual claim brought by a single Utah plaintiff. The Court should not bless a method of demonstrating reprehensibility – and entitlement to large punitive awards – that will effectively allow individual plaintiffs to obtain class action remedies in a setting where none of the procedural protections and due process safeguards of class action litigation obtain. Nor would a defendant reasonably anticipate in a single-plaintiff case that a state court could inflict punishment for the defendant's (or its corporate affiliate's) disparate nationwide activities with respect to thousands or tens of thousands of its policyholders spanning several decades.

Even in civil RICO cases, in which the plaintiff may receive the enhanced remedy of treble damages by showing that the defendant engaged in a pattern of misconduct included but not limited to the defendant's misconduct toward the plaintiff, the focus of the damages award must be on what was done to the plaintiff, not to someone else. *Holmes* v. *Securities Investor Protection Corp.*, 503 U.S. 258 (1992). "As [the Court] said in *Associated General Contractors* [*of Cal., Inc.* v. *Carpenters*, 459 U.S. 519 (1983)], quoting Justice Holmes, '"The general tendency of the law, in regard to damages at least, is not to go beyond the first step."' 459 U. S., at 534 (quoting *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531, 533 (1918)) * * *." *Holmes*, 503 U.S. at 271-272. The Court accordingly "h[e]ld not that RICO cannot serve to right the conspirators' wrongs, but merely that [the parties before the Court] are not proper plaintiffs." *Id.* at 274. So too here, a holding that the Campbells' punitive damages recovery constitutionally must be based on what was done *to them* by no means would immunize State Farm from being punished in an appropriate



case brought by appropriate plaintiffs who proved actionable harm from one of the specific kinds of disparate conduct punished by the Utah Supreme Court in this case. But any punishment awarded to the Campbells must be based on and in some meaningful way proportional to (though of course it can go beyond compensation for) what was done to them.[5]

A *second* problem with this "scheme" argument is that it is available, at least in theory, in virtually any case against a business defendant. Since corporations owe their shareholders a fiduciary duty to try to make profits, it should surprise no one that many of their activities in our free enterprise system are aimed at furthering that objective. Unless courts insist on limiting consideration of "other conduct" to that which is identical or substantially similar to the defendant's conduct underlying the plaintiff's claim, even a simple lawsuit by a single plaintiff – like this case – can be transformed into a sprawling effort to prove a nationwide scheme of assorted corporate misconduct spanning decades.

Indeed, the lawsuit can be used to punish the defendant not just for *mis*conduct but for socially beneficial conduct. The use of non-OEM parts to repair damaged automobiles, for example, is a cost-saving practice that can help keep insurance premiums

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[5] In mentioning class actions and RICO as available remedies for widespread misconduct, ATRA does not mean to suggest that such remedies would be appropriate against State Farm or to depart from its own longstanding position that such remedies are often abused. See Popeo, *Put an End to RICO Abuse*, N.Y. TIMES, Oct. 23, 2001; Hay & Rosenberg, *"Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 NOTRE DAME L. REV. 1377, 1377 (2000) ("[C]lass actions are without doubt the most controversial subject in the civil process today."). Rather, the point is that even those much-abused recent innovations, *designed* to deal with patterns of conduct, provide all sorts of protections not available to a defendant ostensibly faced with the most traditional form of litigation – a single-plaintiff lawsuit arising out of a discrete occurrence – but then placed on trial to be *punished* for all sorts of other acts.

down and is expressly authorized, so long as adequate disclosures are made, by Utah Code Ann. § 31A-22-319. This practice has its critics, like most cost-saving practices that can reduce insurance premiums. Cf. *Pegram* v. *Herdrich*, 530 U.S. 211, 221-222, 233-234 (2000) (noting that "inducement to ration care goes to the very point of any [health maintenance organization] scheme" and that, despite criticisms of HMOs, the judiciary would intrude on legislative prerogatives if it were to allow wholesale attacks on the congressionally approved practice of using HMOs to ration insurance benefits and contain insurance costs). But it is inconceivable that it is proper to use *the Campbells' third-party bad-faith lawsuit* as the vehicle to carry out a debate about the use of non-OEM parts. And it is even more outlandish to suggest that State Farm was on notice that it could be *punished* in *this* case for being on the wrong side of *that* unrelated debate.

There are lessons to be learned for this case in the qualified-immunity context, which also arises out of the need to give fair notice of liability. See *United States* v. *Lanier*, 520 U.S. 259, 270-271 (1997) ("[i]n effect the qualified immunity test is simply the adaptation of the *fair warning* standard to give officials * * * the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes") (emphasis added). In that context, the Court has faced the same problem of ensuring that fair-notice rules are not subverted through definitional sleights-of-hand.

The Court has repeatedly considered whether an "official protected by qualified immunity may be held personally liable for an allegedly unlawful official action," an inquiry that "generally turns on the 'objective legal reasonableness' of the action * * * assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Anderson* v. *Creighton*, 483 U.S. 635 (1987) (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818-19 (1982)). But, as this Court cautioned in *Anderson*,



> The operation of this standard * * * depends substantially upon the level of generality at which the relevant "legal rule" is to be identified. For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow*. Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights. *Harlow* would be transformed from a guarantee of immunity into a rule of pleading.

*Id.* at 641; accord *Wilson* v. *Layne*, 526 U.S. 603, 614-15 (1999); *Saucier* v. *Katz*, 533 U.S. 194, 202 (2001).

By defining State Farm's "misconduct" broadly as a nationwide scheme to treat its insureds and others unfairly – rather than specifically as the handling of and refusal to settle for policy limits the third-party claims asserted against policyholders in Utah – the Utah Supreme Court and respondents are trying to circumvent the fair-notice-based limits on excessive punishments through the simple expedient of defining the "misconduct" broadly. That is no more acceptable in this setting than it is in the qualified-immunity context.

To avoid that problem, this Court should make clear (once again) in this case that the reprehensibility factor turns on the wrongfulness of the specific conduct of the defendant toward the plaintiff who is before the Court. And, as explained above, the fundamental requirement of fair notice means that the reprehensibility inquiry must focus on the time frame in which that conduct occurs. The Utah Supreme Court's analysis fails to adhere to these principles.

**B. The Utah Supreme Court Misunderstood And Misapplied The Ratio Factor**

In *BMW*, this Court held that it was appropriate, in the excessiveness inquiry, to consider "the disparity between the harm or potential harm suffered by Dr. Gore and his punitive damages award." 517 U.S. at 575. This "ratio" factor derives from the "fair notice" concept of due process because what due process requires is not just notice that conduct is tortious, and not just notice that it is punishable, but "*adequate notice of the magnitude* of the sanction" that might be imposed. *Id.* at 574 (emphasis added). And the "long pedigree" of the "reasonable relationship" principle, the Court observed, was reflected in both ancient and modern provisions for double, triple, or quadruple damages. *Id.* at 580-581 & n.33. Relying in part on the ratio factor, the Court invalidated a punitive damages award that was "500 times the amount of [Dr. Gore's] actual harm as determined by the jury" (a diminution in the vehicle's value of $4,000). *Id.* at 581-582. The enormous size of that ratio, the Court explained, "indicate[d] that BMW did not receive adequate notice of the magnitude of the sanction that Alabama might impose." *Id.* at 574-575.

The Utah Supreme Court misapplied this factor in several key respects. First, it ignored this Court's teaching that the principal focus of the ratio factor is on the defendant's conduct *toward the specific plaintiff before the Court*. See pages 10-11, *supra*. Although this Court in *TXO* suggested that it might be appropriate in evaluating the punishment-to-harm ratio to consider "the possible harm to other victims that might have resulted if *similar* future behavior were not deterred" (509 U.S. at 460), it did not endorse what the Utah Supreme Court did here, which was to consider a vast array of potential or actual harms stemming from different and unrelated conduct by State Farm or its affiliates – much of it occurring in other States and remote in time from State Farm's handling of Mr. Campbell's case. Nor is the Utah Supreme Court's analysis consistent with the notion that the ratio guidepost ensures that the defendant receive fair notice of the potential penalty to which he might be subject.



Symptomatic of the lower court's overbroad approach is the following passage in which the Utah Supreme Court discusses the "[e]ffect of State Farm's misconduct on the Campbells and others" (Pet. App. 22a-23a; see also *id.* at 30a-31a (in analyzing the *BMW* ratio factor, "incorporat[ing] by reference" this earlier discussion)):

> State Farm's continuing illicit practice created market disadvantages for other honest insurance companies because those practices increased profits. As plaintiffs' expert witnesses established, such wrongfully obtained competitive advantages have the potential to pressure other companies to adopt similar fraudulent tactics, or to force them out of business. Thus, such actions cause distortions throughout the insurance market *and ultimately hurt all consumers.* Because State Farm's actions have such potentially widespread effects, this factor supports a high damages award.

Pet. App. 23a (emphasis added; citation omitted). As this passage makes clear, the Utah Supreme Court did not merely consider the actual and potential effects on State Farm policyholders of conduct completely unrelated to State Farm's handling of Mr. Campbell's claims; it also considered indirect effects of State Farm's "scheme" on other insurers and, ultimately, on consumers in general. That approach renders the "ratio" calculation essentially meaningless.

Second, in a manner reminiscent of *Bouie* v. *City of Columbia*, *supra*, the state court departed radically from what any reader of prior state cases could have thought to be its approach to assessing the magnitude of punishment. Both the ratio and the magnitude in absolute terms of the punitive award in this case were far out of line with anything State Farm could have taken into account when it engaged in the relevant conduct. As of the time of State Farm's tort, the largest punitive award that had ever been approved in Utah was $500,000. *Von Hake* v. *Thomas*, 705 P.2d 766 (Utah 1985). Even by the time the case reached the state supreme court, the largest award that had ever

been upheld in the State for *any* misconduct was $4 million. *Crookston* v. *Fire Ins. Exch.*, 860 P.2d 937 (Utah 1993). And, according to the Utah Supreme Court itself, "[t]he 'law' that punitive to compensatory ratios of greater than 3 to 1 * * * would be viewed skeptically when challenged as excessive * * * was settled." *Id.* at 939. If State Farm can be said to have had fair notice that an award of $145 million, and a 145:1 ratio, would be upheld in this case, then "fair notice" has no meaning.

### C. The Proper Focus Of The Third *BMW* Factor Is On Sanctions That Might Realistically Be Imposed For The Defendant's Misconduct Toward The Plaintiff

In *BMW*, this Court cited the disparity between the $2 million punitive award and "the civil remedies authorized or imposed in comparable cases" as one of the "guideposts" that "indicate[d] that BMW did not receive adequate notice of the magnitude of the sanction that Alabama might impose." 517 U.S. at 574. "The maximum civil penalty authorized by the Alabama Legislature for a violation of the Deceptive Trade Practices Act," the Court noted, "is $2,000." *Id.* at 584. In addition, while other States authorized slightly higher penalties ranging up to $10,000, many of them also "draw a distinction between first offenders and recidivists." *Ibid.* "None of these statutes," the Court explained, "would provide an out-of-state distributor with fair notice that the first violation * * * might subject an offender to a multimillion[-]dollar penalty." *Ibid.*

In this case, the court below concluded that the third *BMW* factor did not require a reduction of the jury's $145 million punishment because State Farm supposedly could have been required under Utah law to (1) "pay a $10,000 fine for each act of fraud" under the claim practices provisions of the Utah Insurance Code (see Utah Code Ann. §§ 31A-26-301 to -311); (2) "renounce its business license or have its Utah operations dissolved" under the Utah Insurance Code or the state equivalent of the Racketeer Influenced Corrupt Organizations (RICO) statute (see Utah Code Ann. §§ 31A-26-213 (giving state insurance commissioner power to revoke, suspend, or limit



an insurance license for violation of any insurance statute, valid rule, or valid order), 76-10-1602(ppp) (defining "unlawful activity" to include a "confidence game"), 76-10-1603.5(5) (allowing dissolution of an "enterprise" as a possible penalty for violating state equivalent of RICO)); (3) "disgorge all the illicit profits gained by the scheme, plus pay a fine of twice the value of those profits" under the state equivalent of RICO; and (4) "publically [*sic*] acknowledge that its officers had been convicted of fraud." Pet. App. 35a. In addition, it reasoned, "State Farm's officers could be imprisoned or removed from office for up to five years." *Ibid.*

In approving this analysis of the third *BMW* factor, the Utah Supreme Court made two interrelated errors. First, as with its application of the other *BMW* factors, the lower court failed to confine its inquiry to the penalties that could be imposed for State Farm's *conduct vis-à-vis Mr. Campbell*. Rather than ask what penalties could reasonably be imposed in Utah for an insurance company's failure to settle third-party claims within the policy limits, the Utah Supreme Court considered the potential penalties for the sprawling nationwide "scheme" of bad conduct alleged by plaintiffs. Second, and relatedly, the Utah Supreme Court considered all manner of hypothetical penalties of the Chicken-Little variety, including revocation of State Farm's license to do business in Utah. Contrary to the Utah Supreme Court's suggestion, this approach to the third *BMW* factor is not mandated by this Court's decisions. In fact, *Cooper* suggests that reviewing courts must eschew "unrealistic" assumptions in applying the *BMW* guideposts. 532 U.S. at 442. If accepted, the Utah Supreme Court's interpretation of the third *BMW* factor would convert it into a justification for massive punitive damages awards.

Had the Utah Supreme Court focused on the comparable penalty for State Farm's conduct toward *Mr. Campbell*, it would have concluded that the maximum penalty under the Utah Insurance Code for a single act of conduct of the kind found here was a $10,000 fine. The Court's invocation of other statutory penalties was erroneous because, for example, there

was no claim asserted in this case of a violation of the Utah RICO statute. As for the more far-fetched punishments conjured up by the lower courts (such as the imprisonment of State Farm officers and the loss of its business license), the Utah Supreme Court in crediting those possibilities simply misread *BMW*; that decision does *not* require the use of such hypothetically available punishments (even assuming they were hypothetically available here). In fact, the Court in *BMW* referred to "the civil remedies *authorized or imposed* in *comparable cases*" – suggesting that the authorized maximum was not the only measure of this "guidepost." 517 U.S. at 574.[6]

Moreover, any doubt on this score has been set to rest by *Cooper*. There, this Court made clear in ordering a remand that a reviewing court should avoid "unrealistic" assumptions in applying the *BMW* factors to assess excessiveness. 532 U.S. at 442. More specifically, in discussing the comparable-punishments guidepost the Court refused to credit the plaintiff's argument that the defendant would have received the maximum penalty for each of the thousands of offending pieces of promotional materials that it sent out, explaining instead that it was more realistic to think that this conduct would have been treated as a single violation. *Id.* at 442-443. On remand, the Ninth Circuit understood this Court to have instructed it to look not at what penalties theoretically *might* have been imposed on the defendant, but at whether "Cooper's conduct *likely would* * * * have been subject to civil penalties in any amount approaching the punitive damages awarded by the jury," which the court concluded it would not. *Leatherman Tool Group, Inc.* v. *Cooper Industries, Inc.*, 285 F.3d 1146, 1148 (9th Cir. 2002).

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[6] *Even if* there were warrant to take criminal penalties into account, an award of $145 million would be shocking. In *BMW*, which involved "only" a $2 million punishment, the Court "c[ould] not * * * accept the conclusion of the Alabama Supreme Court that BMW's conduct was sufficiently egregious to justify a punitive sanction that is tantamount to a *severe criminal penalty*." 517 U.S. at 585 (emphasis added).



The Ninth Circuit on remand cut the punitive award by almost 90%, from $4.5 million to $500,000. See also *In re Exxon Valdez*, 270 F.3d 1215, 1245-1246 (9th Cir. 2001). Likewise, the Eleventh Circuit has soundly reasoned from the notice principle underlying the third *BMW* guidepost: "it cannot be presumed that the defendant had notice that the state's interest in the specific conduct at issue in the case is represented by the maximum fine provided in the statute." *Johansen* v. *Combustion Engineering, Inc.*, 170 F.3d 1320, 1337 (11th Cir. 1999).

In a world in which severe statutory penalties are often *theoretically* available for conduct that is widespread and generally not punished at all, see *Bowers* v. *Hardwick*, 478 U.S. 186, 197 (1986) (Powell, J., concurring), surely attention to realistically likely penalties is the only approach that will provide meaningful constitutional protection against grossly excessive penalties. Cf. *Lankford* v. *Idaho*, 500 U.S. 110 (1991) (although death penalty was *theoretically* available against defendant at all times, course of proceedings led him reasonably to believe that it was not a realistic possibility, and due process was violated when death sentence was imposed without adequate chance to argue against it), *cited in BMW*, 517 U.S. at 574 n.22. And it is noteworthy that no insurance commissioner or criminal prosecutor in any State has ever sought against State Farm draconian penalties for any part of its allegedly widespread "scheme" even remotely resembling the penalties hypothesized by the Utah Supreme Court.

The Court's more realistic approach in *Cooper* comports with the Due Process Clause's requirement of fair notice. The actual practices of prosecutors and government agencies in enforcing statutory penalties are more likely to inform reasonable people's expectations about punishments to which they may be subject than are theoretical maximum penalties shorn of practical realities. For this reason, and for the even more fundamental reason that the Utah Supreme Court did not properly confine its analysis under this guidepost to the likely

punishments for State Farm's conduct *toward Mr. Campbell*, that court seriously misanalyzed the third *BMW* guidepost.

### D. There Is No Fourth *BMW* Guidepost Allowing "Wealth" To Justify An Otherwise Unconstitutional Award Of Punitive Damages

In applying *state law* to the question whether the punitive damages award in this case was excessive, the Utah Supreme Court addressed as its very first and apparently most important factor the "wealth" of State Farm. Pet. App. 15a-17a. Taking "wealth" or "financial position" into account in a multifactor test as a matter of state law has thus far not been held to be constitutionally forbidden. See *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 21-23 (1991); *BMW*, 517 U.S. at 591 (Breyer, J., concurring). But it is a very different proposition to try to incorporate wealth into the *federal constitutional* inquiry under *BMW*. See *Perez* v. *Z Frank Oldsmobile, Inc.*, 223 F.3d 617, 625 (7th Cir. 2000) ("constitutional limits on punitive damages * * * come into play only after the assessment has been tested against statutory and common-law principles"). And yet the Utah Supreme Court completely failed to see the distinction. In its discussion of *federal law*, Pet. App. 28a-37a, the Utah Supreme Court observed that "the trial court relied on the following facts to justify the high punitive damages award: * * * (2) State Farm is an enormous company with massive wealth." Pet. App. 30a. And the Utah Supreme Court responded with absolutely no federal analysis: "Because State Farm's objections to considering relative wealth * * * are identical to its arguments against the punitive damage award under *Crookston I* [a Utah Supreme Court case addressing state law only], we again incorporate by reference our previous analysis of *Crookston I* factor[] one * * * in section "IA" 1 * * * of this opinion [Pet. App. 15a-17a]." Pet. App. 30a-31a. That was a most serious error.

In *BMW*, the Court observed that "[t]he fact that BMW is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the



several States impose on the conduct of its business." 517 U.S. at 585.[7] For that reason, the Court did *not* include wealth among its federal constitutional "guideposts." And its failure to do so was surely advertent: the respondent in *BMW* argued quite specifically that the $2 million punitive award could be justified on the basis of BMW's "wealth." Brief of Respondent at 39, *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559 (1996) (No. 94-896). Similarly, in *Cooper Industries* the Ninth Circuit's original opinion held that "the size of an award necessary to create deterrence to an entity of Cooper's size and assets" was one of the main factors foreclosing a federal due process challenge to that award. *Leatherman Tool Group, Inc.* v. *Cooper Industries, Inc.*, 1999 WL 1216844, at *1 (9th Cir. Dec. 17, 1999), vacated, 532 U.S. 424 (2001), on remand, 285 F.3d 11246 (9th Cir. 2002). Yet this Court's commentary on the size of the award focused *exclusively* on the three *BMW* guideposts, pointedly omitting any further mention of Cooper's "wealth." On remand, the Ninth Circuit again mentioned Cooper's "wealth" but then stated, "in view of the *Gore* factors, we cannot conclude that this consideration renders the amount awarded by the jury constitutional." 285 F.3d at 1152.

Just so. If a defendant can be said to be on "notice" – the touchstone of the *BMW* factors – that its "wealth" subjects it to greater punishment than the same conduct would justify for a different and less "wealthy" defendant, it is only for the circular reason that *any* arbitrary factor can be touted, before a punish-

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[7] "Indeed," this Court added, "its status as an active participant in the national economy implicates the federal interest in preventing individual States from imposing undue burdens on interstate commerce." 517 U.S. at 585. Though the impermissible extra-territoriality of the Utah Supreme Court's decision is not the main focus of this *amicus* brief, one of the vices of emphasizing the "wealth" of corporations doing business nationwide is that it inevitably threatens the ability of each State to regulate as it sees fit, a point of particular importance to the insurance industry, see *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 780 (1993) (discussing McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*).

ment is imposed, as relevant to that punishment. For reasons persuasively explained in Polinsky & Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 910-914 (1998), among other commentaries, it is simply not true that "wealth" of a corporate defendant is properly taken into account in achieving optimal levels of deterrence through punitive damages. To be sure, States are not compelled by the Constitution to agree with Professors Shavell and Polinsky, but this Court's *independent* obligation to give meaning to the federal constitutional limits on grossly excessive punitive damages can and properly should take account of such persuasive economic analyses. See also *Zazú Designs* v. *L'Oréal, S.A.*, 979 F.2d 499, 508 (7th Cir. 1992); Brief of Business Roundtable as *Amicus Curiae*; cf. *BMW*, 517 U.S. at 594 (Breyer, J., concurring) (noting that a "constraining 'economic' theory" *might* cause the Court to review an otherwise suspect award "more deferential[ly]").

Given that consideration of a corporation's "wealth" bears no more proper relation to the size of a punitive damages award than the fact that the corporation's name starts with "S," and especially given that this Court has eschewed every opportunity to tie the federal analysis of excessiveness of punitive damages under the Due Process Clause to "wealth," it is no less a violation of "fair notice" principles to try to incorporate "wealth" into the *BMW* analysis – as the Utah Supreme Court did – than to punish all "S"-named corporations more severely than all others. Indeed, announcing and then applying an "S"-named corporations rule would be less troubling, because a corporation once notified of the rule could change its name. By contrast, what is a corporation "notified" that it will be punished more severely if wealthy supposed to do differently in light of that notice? It is "as if having a large net worth were the wrong to be deterred!" *Zazú*, 979 F.2d at 908 (exclamation point in original).

Whether for these reasons or for others, this Court has unwaveringly kept "wealth" *out* of the federal constitutional analysis of excessiveness of punitive damages, and it should stay the



course. The Utah Supreme Court seriously misunderstood the *BMW* guideposts when it "incoporate[d] by reference" its state-law analysis of wealth into its federal constitutional analysis, and this Court should correct that error.

## CONCLUSION

The judgment of the Utah Supreme Court should be reversed.

Respectfully submitted.

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